

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg
MOTORS LIQUIDATION COMPANY, . Chapter 11
et al., f/k/a GENERAL .
MOTORS CORP., et al, . (Jointly administered)
Debtors. . One Bowling Green
New York, NY 10004
. Wednesday, November 16, 2016
..... 11:38 a.m.

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE (CC: DOCUMENT NUMBER
13786, RELATED DOCUMENT(S) 13373, 13775, 13697)
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: King & Spalding LLP
By: ARTHUR STEINBERG, ESQ.
SCOTT DAVIDSON, ESQ.
1185 Avenue of the Americas
New York, New York 10036-4003
(212) 556-2158

For the Ignition Switch plaintiffs and certain non-Ignition Switch plaintiffs: Brown Rudnick LLP
By: EDWARD S. WEISFELNER, ESQ.
7 Times Square
New York, New York 10036
(212) 209-4917

For Sesay, Bledsoe and Elliott: GARY PELLER, ESQ.
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9122

APPEARANCES CONTINUED.

Audio Operator: Jonathan, ECRO

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10110 Youngwood Lane
Fishers, IN 46038
(855) 873-2223
www.accesstranscripts.com

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APPEARANCES (Continued) :

For Personal Injury
Accident Plaintiffs: Goodwin Procter LLP
By: WILLIAM P. WEINTRAUB, ESQ.
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 813-8839

For the GUC Trust
Administrator: Gibson, Dunn & Crutcher LLP
By: MITCHELL KARLAN, ESQ.
200 Park Avenue
New York, New York 10166-0193

For Participating
Unit Holders: Akin Gump Strauss Hauer & Feld LLP
By: DEBORAH NEWMAN, ESQ.
One Bryant Park
New York, NY 10036-6745
(212) 872-1000

TELEPHONIC APPEARANCES:

For Bernard Pitterman: Adelman Hirsch & Connors LLP
By: JORAM HIRSCH, ESQ.
1000 Lafayette Boulevard
Bridgeport, CT 06604
(203) 331-8888

For Benjamin Pillars: The Mastromarco Firm
By: RUSSELL C. BABCOCK, ESQ.
1024 North Michigan Avenue
Saginaw, MI 48602
(989) 752-1414

For Corvette economic
loss plaintiffs: Knapp, Petersen & Clark
By: ANDRE E. JARDINI, ESQ.
K.L. MYLES, ESQ.
550 North Brand Boulevard, Suite 1500
Glendale, CA 91203-1922
(818) 547-5000

For Pope plaintiffs: Ledford Law Firm
By: KRIS T. LEDFORD, ESQ.
1437 South Boulder Avenue West #820
Tulsa, OK 74119
(918) 376-4610



1 (Proceedings commence at 11:38 a.m.)

2 THE COURT: All right. The next is Motors
3 Liquidation Company, 09-50026.

4 Let's wait until everybody gets settled, Mr.
5 Steinberg, okay?

6 All right. Let me get the appearances from those who
7 are going to speak.

8 MR. BABCOCK: Your Honor, Russell --

9 THE COURT: Okay. Let me do the people in the
10 courtroom first, okay?

11 Go ahead, Mr. Steinberg.

12 MR. STEINBERG: Arthur Steinberg and Scott Davidson,
13 King & Spalding, on behalf of New GM.

14 MR. WEISFELNER: Good morning, Your Honor. Edward
15 Weisfelner, Brown Rudnick, on behalf of the co-lead counsel and
16 the MDL, sometimes referred to as designated counsel for the
17 economic loss plaintiffs.

18 THE COURT: Thank you.

19 MR. WEINTRAUB: Good morning, Your Honor. William
20 Weintraub of Goodwin Proctor, also as designated counsel for
21 the pre-closing ignition switch plaintiffs and for certain
22 post-closing non-ignition switch plaintiffs.

23 THE COURT: Thank you.

24 MR. PELLER: Good morning, Your Honor. Gary Peller
25 for the Elliott, Sesay, and Bledsoe plaintiffs, who include pre

1 and post-sale economic loss and personal injury and property
2 damage plaintiffs.

3 THE COURT: Thank you, Mr. Peller.

4 MR. KARLAN: Good morning, Your Honor. Mitchell
5 Karlan from Gibson, Dunn & Crutcher for the GUC Trust.

6 MS. NEWMAN: Good morning, Your Honor. Deborah
7 Newman from Akin, Gump, Strauss, Hauer & Feld on behalf of a
8 group of unaffiliated participating unitholders in the GUC
9 Trust.

10 THE COURT: Thank you. Anybody else in the courtroom
11 making an appearance?

12 All right. Anybody on the phone making an
13 appearance?

14 MR. BABCOCK: Yes, Your Honor. Russell Babcock
15 appearing on behalf of creditor, Benjamin Pillars.

16 MR. JARDINI: Good morning, Your Honor. Andre
17 Jardini and K.L. Myles of Knapp, Petersen & Clark for the
18 Corvette economic loss plaintiffs.

19 MR. HIRSCH: Good morning, Your Honor. Joram Hirsch,
20 Adelman, Hirsch & Connors, for the plaintiff -- for the
21 Pitterman plaintiff.

22 MR. LEDFORD: This is Kris Ledford of Ledford Law
23 Firm for the Pope plaintiffs, which were brought in under the
24 --

25 THE COURT: Just say that again. I'm sorry, I didn't

1 hear you.

2 MR. LEDFORD: Kris Ledford for the Pope plaintiffs.

3 We were brought in.

4 THE COURT: No, that, I heard. I thought there was
5 somebody after you, Mr. Ledford.

6 MR. LEDFORD: Okay. I'm sorry.

7 THE COURT: Anybody else on the phone making an
8 appearance?

9 All right. Mr. Steinberg.

10 MR. STEINBERG: Your Honor, I'm -- I want to be able
11 to try to give you a little more background as to how this was
12 developed, and I'm going to try very hard not to try to argue a
13 position as compared to try to give you context because this is
14 set up for a briefing opportunity, and at that point in time,
15 I'll present my argument more formally, and if there's oral
16 argument, I'll be able to present it, as well. And just -- if
17 you just leaf through the status report, you'll --

18 THE COURT: I did that several times yesterday.

19 MR. STEINBERG: -- you'll see that there is a number
20 of footnotes on the first couple of pages, which have
21 definitions. And I think just Your Honor appreciates why that
22 has occurred.

23 When this matter was originally argued in front of
24 Judge Gerber, we used certain type of nomenclature. In the
25 context of the MDL this year, the plaintiffs have tried to

1 introduce new nomenclature. What you're getting on these
2 footnotes is our trying to stay with the original nomenclature,
3 and designated counsel for the economic loss plaintiff's trying
4 to introduce its new nomenclature and primarily relates to what
5 they call the second ignition switch -- second-stage ignition
6 switch plaintiffs.

7 And I understand what they're doing and I didn't want
8 to quarrel with it, but I wanted to explain to Your Honor why
9 you're seeing two sets of definitions. Ultimately, when we --
10 if we get to the stage where we're drafting something, we'll
11 have to agree to a convention as to what the right terms are so
12 that Your Honor will have a clear record, but that's what you
13 see when you have it here.

14 You also see from the background section that we
15 originally started this process with the designated counsel,
16 Mr. Weisfelner and Mr. Weintraub, and then we broadened it to
17 what we call the core parties. And to date, the people who
18 have gotten the status report, which is publicly filed, are the
19 core parties, and the core parties are in paragraph 3. And you
20 could see there, it is not just the people who had
21 traditionally appeared before Judge Gerber, as well, but we
22 included all the parties that were subject to pending motions
23 to enforce, of which I think there are three. And that's why
24 you have some of the counsel on the phone that have
25 participated or at least are listening to it. So they -- some

1 of them presented issues and some of them have voiced their
2 views.

3 In paragraph 6, we try to -- to try to give Your
4 Honor a feeling of what's going on in other courts as they
5 relate to what we're asking you to decide here because there is
6 an overlap and we wanted to make sure that Your Honor
7 understood it, and I apologize because I think that because of
8 the flurry of activity that took place in the MDL at the very
9 end of the last week, I don't know whether we have given you,
10 as we normally do, some of the relevant pleadings in the MDL.
11 But on Friday, the -- New GM filed its brief, its opening
12 brief, on the successor liability issue. So to the extent that
13 Your Honor has an interest in it, usually Your Honor collects
14 the paper, then we would be happy to do that, as well, too. I
15 don't think we did that.

16 THE COURT: Let me ask you this, Mr. Steinberg,
17 because on page 18 of this status report, in paragraph 6, you
18 say if there are any -- if there are unresolved issues after
19 Judge Furman has rendered his decision on the successor
20 liability issue, should this Court decide any successor
21 liability issues? So what is it that's before Judge Furman?
22 What is he being asked to decide?

23 MR. STEINBERG: The fourth amended consolidated
24 complaint before Judge Furman was filed by the economic loss
25 plaintiffs, so it doesn't have any accident component to it.

1 The general thrust of the complaint that was filed says that
2 for ignition switch plaintiffs, there should be successor
3 liability based on the continuous enterprise exception to
4 successor liability. They don't argue fraud on the court or,
5 you know, some kind of fraud in the transaction. They don't
6 argue that this was assumed. They argue basically the
7 continuous enterprise. And then, there are 16 states that are
8 being briefed. New GM, in its opening brief, argued for
9 federal choice of law and then saying that either Delaware or
10 New York applies. I assume that when we see their responsive
11 brief, they will say that other laws apply. And in the context
12 of those other lies, some of 16 jurisdictions have other
13 exceptions to successor liability. I think one of them may
14 have something called a continuing enterprise exception.

15 THE COURT: At some point, I read some -- a prior
16 decision by Judge Furman where I thought that he had dealt with
17 economic loss claims and focused on the law. Several states --
18 I may am misremembering what I read. It was some months ago.

19 MR. STEINBERG: There was another decision by Judge
20 Furman, I think, and I'm sure someone will correct me if I'm
21 wrong. I think it related to a motion to dismiss, so he
22 briefed -- people briefed it under a number of different
23 states, and it generally dealt with the issue as to whether
24 their theory of damages that --

25 THE COURT: Yes, that was the decision I read.

1 MR. STEINBERG: -- on a brand basis, would apply, and
2 then people briefed the brand damage issue under various states
3 and Judge Furman wrote a ruling on that.

4 THE COURT: All right. So what is the -- just to --
5 what's the successor liability issue that you think this Court
6 will be asked to decide?

7 MR. STEINBERG: Well, Your Honor, we put it as a
8 deferred issue because it may not be anything, right, so -- but
9 in accident cases, compared to an economic loss case, they may
10 argue that in their particular jurisdiction that they are more
11 apt to be able to utilize something like the product line
12 exception. And I think one of the arguments that we've made
13 before Judge Furman is that the product line exception does not
14 apply to an economic loss-type case.

15 THE COURT: Okay.

16 MR. STEINBERG: So there could be some fallout here,
17 but obviously people feel, as a general matter, that Judge
18 Furman's decision on successor liability on the continuing
19 enterprise exception will have a great deal of relevance of
20 what might happen here because if Your Honor -- because if
21 Judge Furman decides that there is no successor liability
22 finding, then some of the dispute, in our belief, with regard
23 to non-ignition switch plaintiffs as to whether they can
24 approve a due process violation -- if all you do by
25 accomplishing as a due process violation is to bring a

1 successor liability claim and Judge Furman has already ruled
2 that there is no such successor liability claim, then --

3 THE COURT: So when's the briefing supposed to be
4 complete before Judge Furman?

5 MR. STEINBERG: I think their brief is due in --
6 sometime in December, and then our reply brief is due sometime
7 in January. So it's on a fairly fast track. I think it'll be
8 fully submitted before February, and then the question is
9 whether they'll hear oral argument or not.

10 THE COURT: All right.

11 MR. STEINBERG: So you have the successor liability
12 issue, which we refer to in paragraph 6 of the status report,
13 which is going on in the district court.

14 Yesterday -- and we will send this to Your Honor, as
15 well, too -- the appeal of Judge Gerber's December judgment by
16 what I'll call the Adams plaintiffs was filed before Judge
17 Furman, as well.

18 THE COURT: I got ECF notice of a filing of that
19 brief because it was an appeal from Judge Gerber. So in
20 theory, I'm supposed to get automatically, and so I think I
21 actually printed out that brief.

22 MR. STEINBERG: Okay. So --

23 THE COURT: It's only the one brief so far that's
24 been filed.

25 MR. STEINBERG: That's correct. And I think our

1 brief is due sometime again in December, December 21, and then
2 their brief, their reply would be due sometime in January. So
3 that also is on a fairly aggressive briefing schedule and -- to
4 be resolved. And the issue in that appeal, which I think is
5 referenced in the status report, is they argue that they didn't
6 get to file a proof of claim in the bankruptcy case because of
7 some New GM conduct after the sale, and therefore they thought
8 they had an independent claim or some type of claim related to
9 that, and we're briefing that issue for Judge Furman.

10 THE COURT: All right.

11 MR. STEINBERG: The third issue which is referenced
12 in paragraph 6, which is not on an aggressive briefing
13 schedule, but I want to put that into context, is that Judge
14 Furman has set dates for when he will hear class certification
15 issues and summary judgment issues, and I think those dates
16 actually have their ending briefs sometime in the spring of
17 2018. And the reason why I mention that -- those types of
18 procedures, because in the event that this Court will deal with
19 issues relating to a claim, then issues relating to class
20 certification of a late-filed claim, issues relating to the
21 merits of a claim, will overlap with some of that briefing that
22 is there. So when I get to the --

23 THE COURT: We'll come to the late-filed claim --

24 MR. STEINBERG: Right.

25 THE COURT: -- issue.

1 MR. STEINBERG: But I just wanted to put into context
2 why we referenced that.

3 THE COURT: Let me deal first with an issue because I
4 see there are -- there's disagreement, put it that way, as to
5 who should be a part of any proceeding here. And you've
6 included, on page 8 of the status report, proposed language
7 that you think should go into an order to show cause. And, you
8 know, I asked myself the question, is an order to show cause
9 effective to compel parties to whom it -- assuming that
10 personal jurisdiction did not previously attach, to appear and
11 respond to the order to show cause. So one of the things --
12 and some of the people have said, well, there needs to be an
13 adversary proceeding. The plan has an injunction, correct?

14 MR. STEINBERG: The sale order has --

15 THE COURT: The sale order has an injunction.

16 MR. STEINBERG: Correct.

17 THE COURT: All right. And Rule 7001(7) says a
18 proceeding to obtain an injunction or other equitable relief,
19 except when a chapter 9, chapter 11, et cetera, plan provides
20 for the relief. So you don't need an adversary proceeding.
21 Does the plain incorporate by reference the sale order?

22 MR. STEINBERG: I think it does. I think it does.
23 But Judge Gerber actually ruled on this issue before as to
24 whether -- and I think the Second Circuit opinion actually
25 dealt with this issue as to whether, on a formalistic basis, we

1 needed to bring these actions by an adversary proceeding or
2 whether it could be done as an injunction to enforce an
3 existing order of this Court. And Judge Gerber clearly held
4 that you can do this by contested matter and motion --

5 THE COURT: What -- to me, the objections that
6 7001(7) really deals with this issue. An adversary proceeding
7 is not required.

8 MR. STEINBERG: Right.

9 THE COURT: Okay. Then the issue becomes, well, what
10 about people who claim they didn't get notice before, all
11 right, and they didn't participate in any of the prior
12 proceedings. And I'll hear argument about it, but my reaction
13 is, okay, we're going to serve them now. Okay. And if the
14 issue whether the injunction in the sale order should be
15 enforced, if they're given -- if you serve them under Rule 7004
16 -- just had that argument before about what that requires,
17 right? If you serve them under 7004, they can be brought in as
18 a party to a contested matter. Ordinarily, it's triggered by a
19 motion, but can also -- an order to show cause has the same
20 effect.

21 MR. STEINBERG: Your Honor, this procedure was
22 utilized by Judge Gerber in connection with the December
23 judgment. He did it by a September 3, 2015 order to show
24 cause.

25 THE COURT: And did you serve everybody?

1 MR. STEINBERG: And we served everybody who had a
2 pending litigation.

3 THE COURT: And some chose not to appear.

4 MR. STEINBERG: And some chose not to appear. And
5 one of the issues that they have a perfect right to argue is
6 that they're not bound by that judgment because they felt that
7 we did something wrong, and that's issue number two. And they
8 could argue that.

9 We're prepared to defend what we have done, and the
10 language about binding everybody was the same type of language
11 that Judge Gerber had put into his order. And one of the
12 issues that happens in this case and that we struggle with is
13 that notwithstanding the sale order and our interpretation of
14 the sale order, people continue to file litigation. So even if
15 Your Honor had ruled on this issue, in 2017, someone may file
16 another complaint against GM and then say, I was never party to
17 the action before. The --

18 THE COURT: Well, I'll hear -- if people have
19 argument on that, I'll hear it, but my initial reaction is
20 exactly that. If you serve them, they can be brought here, and
21 an issue will be are they bound by the prior rulings by Judge
22 Gerber or not. That'll be an issue that -- and seems to me
23 that that is a threshold issue.

24 MR. STEINBERG: That's correct. And, Your Honor, we
25 want to serve, in effect, the entire litigation docket --

1 THE COURT: I'm sure you do.

2 MR. STEINBERG: -- to make sure that whatever Your
3 Honor ruled will be binding on everyone because, to be candid,
4 if Your Honor ruled against us, it's affirmative collateral
5 estoppel against us. If you ruled for us, if I hadn't served
6 them, it's not necessarily the same type of effect the
7 collateral estoppel. So in order for me to get what I want to
8 have, I need to serve as broad as possible. And if someone
9 thinks we hadn't done it before, they will have that opportunity
10 to brief it to Your Honor as to why they should or should not
11 be subject to prior rulings, and we will also then decide
12 whether they still will nevertheless be subject to these
13 existing rulings.

14 THE COURT: Okay.

15 MR. STEINBERG: So the other thing that I just wanted
16 to mention, which I don't think is actually in the papers, is
17 that the GUC Trust actually made another distribution of its
18 funds in the last couple days.

19 THE COURT: I think I got the report of it.

20 MR. STEINBERG: Okay. So -- and when we defined the
21 threshold issues, we were trying carefully not to have anything
22 to have -- that involves discovery, something that could be
23 teed up as, in effect, a straight legal issue to Your Honor,
24 and I think the -- at least the designated counsel, while maybe
25 quarreling with the way we phrased an issue, has endorsed the

1 notion of a threshold issue and a deferred issue primarily for
2 the reasons that I've talked about before, which is that
3 actions that are going on in the district court -- and these
4 rulings will then define who are the non-ignition switch
5 plaintiffs that may be able to take advantage of the Second
6 Circuit opinion and may or may not be bound by Judge Gerber's
7 December judgment. So with that --

8 THE COURT: Tell me -- focus on the non -- and maybe
9 -- I'll ask your view and then we'll hear from other counsel
10 about the non-ignition switch plaintiffs. What is it that
11 you're asking me to decide as a matter of law without
12 discovery? Because it did seem to me that the Second Circuit
13 opinion necessarily, with their remand and lack of decision
14 about non-ignition switch plaintiffs, in determining whether
15 they have a due process argument that they're not bound, isn't
16 that a fact-specific inquiry?

17 MR. STEINBERG: There are two issues that we've
18 identified on non-ignition switch plaintiffs which we believe
19 are threshold issues, which defines the scope. One was Judge
20 Gerber rendered the April 2015 decision, June judgment, which
21 was the decision that went up to the Second Circuit. The
22 people who appealed that decision were specific parties. There
23 was designated counsel for the ignition switch plaintiffs.
24 There was counsel for the pre-sale accident plaintiffs on the
25 ignition switch side. And then, there was Mr. Peller, who had,

1 as part of his 12 clients, had one or two that had non-ignition
2 switch plaintiffs there. So when the Second Circuit ruled
3 whatever it ruled and -- then the question was who was it
4 ruling on behalf of, was it ruling solely on behalf of the
5 appellants that were before it or was it making a broader
6 pronouncement that would be binding and for the benefit of all
7 non-ignition switch plaintiffs, and does a court of appeals get
8 to rule on something greater than the issues that were
9 presented before it? That's one set of issues.

10 The second thing was that when Judge Gerber realized
11 that he was going to be retiring at the end of 2015, he had
12 said to the parties, I want to wrap up everything that you
13 think I may need to wrap up as part of the GM proceedings, and
14 what happened after he rendered his June judgment is that there
15 was this concept of -- where the parties believed they were
16 bound by that June ruling. And so he was getting a flurry of
17 papers by people who said, I am not bound. So he said, you
18 know what, stop with sending me papers, let's get it all
19 resolved at one time. And then, that led to proceedings and
20 October 14th oral argument, November decision, December 3
21 judgment. That was appealed by only a limited amount of
22 people.

23 And in that November decision, he had specific
24 rulings with regard to non-ignition switch plaintiffs,
25 basically saying, in our view, that they had their opportunity

1 to allege whatever due process violation. They didn't allege
2 it, and therefore they can't assert independent claims.

3 THE COURT: Let me ask you this. So the Second
4 Circuit decides what it decided. And would you agree that that
5 is a subsequent decision to what Judge Gerber decided and
6 reflects a change in the law from what he found with respect to
7 due process?

8 MR. STEINBERG: That --

9 THE COURT: Here's where I'm going, Mr. Steinberg.
10 Wouldn't those parties who hadn't -- who did not appear,
11 wouldn't they have an argument in this Court under Bankruptcy
12 Rule 9024, which incorporates Rule 60, and wouldn't this be a
13 60(b)(6), any other reasons that justify relief where there's
14 been a subsequent change in the law, so wouldn't -- I'm not
15 deciding it now, but I know you're -- you have set out in the
16 issues, are they bound, if I agree that's an issue? Are those
17 who did not appeal bound by Judge Gerber's decision, which they
18 didn't appeal?

19 And it does seem to me that if the Second Circuit, to
20 the extent it pulls the rug out from under the prior decisions,
21 those people who didn't join in the appeal would have an
22 argument under 9024 that based on a subsequent change in the
23 law, they should be relieved from the judgment. Do you agree
24 that would be an issue? I'm not saying -- I'm not deciding it,
25 but you're putting a lot of weight on the argument that, well,

1 hey, they didn't appeal, it's tough luck, they're out of luck,
2 even if there's a change in the law subsequently, it's too bad
3 for them because they didn't appeal it.

4 MR. STEINBERG: Well, I think, Your Honor, that the
5 answer is not as simple as Your Honor has presented and that --

6 THE COURT: I'm not deciding an issue.

7 MR. STEINBERG: I understand, but to --

8 THE COURT: You made it seem like it was crystal
9 clear that, of course, they can't --

10 MR. STEINBERG: No, no. All I tried to do was to say
11 what the issue was.

12 THE COURT: Okay.

13 MR. STEINBERG: I assume that the other side will
14 tell me that I'm wrong and Your Honor will -- ultimately will
15 have to decide. I'm just trying to identify the issue for you,
16 which is that -- one issue is --

17 THE COURT: I agree that an issue -- and I would
18 agree that it is a threshold issue whether parties who didn't
19 appeal are bound by the earlier decision and judgment.

20 MR. STEINBERG: Right. And there's --

21 THE COURT: I'm not necessarily framing it exactly,
22 but I think that's an issue.

23 MR. STEINBERG: And just to put the context that at
24 least I'd like you to think about, and I'm sure others will
25 tell me again why they think I'm wrong, the Second Circuit

1 ruling had nothing to do with the December judgment, and there
2 were other parties, not economic loss plaintiffs, that were
3 involved in the December judgment. And their failure to
4 appeal, we think, has consequences. And while the Second
5 Circuit said the non-ignition switch plaintiffs may have been
6 required an opportunity to also show -- that they can show due
7 process violation, the December judgment that Judge Gerber
8 ruled said they had another six months to say something and
9 they didn't say something and bring out to me, and so I would
10 argue and I will argue that the December judgment was something
11 totally different than what the Second Circuit was ruling on,
12 and they actually didn't have the benefit of what went on
13 there.

14 THE COURT: That's fine.

15 MR. STEINBERG: And the only other thing that I would
16 say is that -- and you will see it cited in papers and for and
17 against, is the application of the Supreme Court decision and
18 in the Travelers case, where they reversed one of the Manville
19 decisions and basically said that courts can exceed -- lower
20 courts can exceed their subject matter jurisdiction, and if
21 it's not appealed upon, it is the final order. The only people
22 who preserve that are the people who have raised the due
23 process issue, and if they had the right to assert a due
24 process issue and they didn't do it, then they've waived that
25 right to --

1 THE COURT: Well, 9024 and Rule 60 would seem to run
2 counter to that argument, potentially.

3 MR. STEINBERG: Except the Supreme Court in that case
4 -- and again, I said I didn't really want to argue with that,
5 but the Supreme Court said that there's a policy reason for
6 finality of judgments and they look to enforce that.

7 THE COURT: All right.

8 MR. STEINBERG: And so Your Honor would have to
9 decide whether, notwithstanding that precedent, this should be
10 approached in a different way. And I'm sure others will try to
11 argue why that is wrong, but that's clearly an issue that we
12 need to have Your Honor look at because you need to define the
13 set, the universe of people who are non-ignition switch
14 plaintiffs who can assert whatever the rights that they want to
15 assert are.

16 So that is the -- one of the threshold issues that
17 people have identified. Again, I think we've had the back and
18 forth on the procedure. We're happy to do whatever the
19 procedure is, but we think the order to show cause is the most
20 efficient way. I think designated counsels agree that that's
21 okay. I think Mr. Peller has raised an issue about why that
22 shouldn't be the case, but he's been involved in these
23 proceedings since --

24 THE COURT: Mr. Weintraub, on behalf of certain non-
25 ignition switch post-closing accident plaintiffs, he had --

1 this is on page 11 of the status report. He thinks -- he
2 phrased an issue, are non-ignition switch plaintiffs barred
3 from asserting independent claims against New GM because they
4 purportedly did not appeal, et cetera.

5 MR. STEINBERG: It's the same thing. I think --

6 THE COURT: Do you agree? I mean, you seem to resist
7 listing that as an issue. Why isn't that -- I mean, it seemed
8 to me that that is a genuine threshold --

9 MR. STEINBERG: No, no, no. I think it's the same
10 issue that I've read -- I've written right before the Goodwin
11 Proctor position. I think, to be candid, what's happening here
12 is that people wanted to educate Your Honor as to how this
13 issue should be thought of, so they wrote a longer recitation
14 to it. But when you look at the actual issue that they're
15 prepared to brief on, the designate --

16 THE COURT: That's really a pretty concise statement
17 of the issue that Mr. Weintraub --

18 MR. STEINBERG: Well, yeah, but I don't -- I think
19 ours is an equally concise statement, and I think designated
20 counsel also wanted to rewrite the issue on the appendix. So
21 they have something else, as well, too. But I think we're all
22 saying the same thing, and ultimately --

23 THE COURT: I wish you did. It would have made life
24 a lot easier.

25 MR. STEINBERG: Well --

1 THE COURT: I couldn't believe it took a 19-page
2 status report to identify issues that -- I don't know whether
3 you really agree or disagree or not. I mean, just --

4 MR. STEINBERG: Well, part of --

5 THE COURT: All this is framing the issues and you're
6 going to brief -- besides, you're going to brief it and --

7 MR. STEINBERG: I accept that --

8 THE COURT: I'm expressing a bit of frustration.

9 MR. STEINBERG: I accept that, Your Honor, but to
10 understand it from our side, I didn't want anybody saying that
11 we were not properly presenting their sentiment, and therefore
12 you get another five pages of this draft because people want to
13 frame the issue in the way that they want and some people
14 wanted to argue that these aren't even issues that you should
15 be thinking about. And so I thought I needed to present that.
16 The other five pages was to explain what we did from the July
17 status conference, and I thought the record needed to reflect
18 that. but I do recognize --

19 THE COURT: I kept wondering what happened after the
20 July status conference because I thought I was being ignored.
21 I saw all these status reports before Judge Furman, and then I
22 saw the one that finally triggered my entry of the order
23 because you told Judge Furman what you were going to do here,
24 except you hadn't even told me about it yet.

25 MR. STEINBERG: Well, Your Honor, the -- there was a

1 bellwether case that was before Judge Furman which was coming
2 up to a trial in September, and one of the issues that was
3 going to be in that bellwether trial was whether they can
4 assert a successful liability claim, and I think we actually
5 had written to Your Honor asking for a status conference before
6 that bellwether trial, which was never scheduled, and it so
7 happened that after we filed our brief on successor liability,
8 they withdrew the successor liability cap and the case was
9 ultimately settled. But --

10 THE COURT: All right. Let me hear from other
11 counsel.

12 MR. STEINBERG: Okay. Do you want to hear about the
13 other issues or is it self-evident from --

14 THE COURT: Let's see if we can get through this, and
15 then we'll -- then you can back up, okay?

16 MR. WEISFELNER: Good afternoon, Judge. Ed
17 Weisfelner, Brown Rudnick, on behalf of the MDL co-leads,
18 appearing principally on behalf of economic loss claimants.

19 Your Honor, look, I do think that there is very close
20 to dangerous agreement among us and New GM on what the
21 threshold issues ought to be. We may frame them a little bit
22 differently, and I take Mr. Steinberg's contention to heart
23 that we chose to frame it a little bit differently because we
24 were looking to educate the Court a little bit more.

25 THE COURT: You would never do that, would you?

1 MR. WEISFELNER: We tend to want to avoid that
2 whenever we can. But I do think it's important that we
3 highlight for you, in the context of this status conference and
4 going down the list of the comments that Mr. Steinberg made.

5 THE COURT: I will have forgotten about this when I
6 get to read the briefs that are really going to be the basis
7 for the arguments.

8 MR. WEISFELNER: I'm sure you will.

9 THE COURT: So you're fencing about words here and
10 there.

11 MR. WEISFELNER: No. That's right, and I'll do this
12 quickly. Mr. Steinberg talked about sets of definitions, and
13 that's why we had so many footnotes in the status report. And
14 clearly, there is a difference between what they refer to as
15 "ignition switch plaintiffs," what we tend to refer to as
16 "first wave." And the difference is the number of cars that
17 are involved.

18 Your Honor will come to learn, or you already know,
19 that in the first wave of recalls, the first few recalls that
20 GM did, there were approximately 2- to 3 million cars that were
21 the subject of that recall. The second set of recalls, all
22 done within the same 30 or 45 days, ultimately brought the
23 number of recall vehicles up to 27 million. Put that in
24 context, there were 70 million GM cars on the road.

25 THE COURT: How does that make a difference in terms

1 of the issues I have?

2 MR. WEISFELNER: Because we take the position that
3 the four threshold issues that were before Judge Gerber dealt
4 specifically and exclusively with the first set of recalled
5 vehicles, those being the first-wave ignition switch defect
6 vehicles.

7 Now, we come to the Second Circuit opinion, and in
8 our view -- and frankly, if you take a look at the procedural
9 background in Judge Gerber's decisions, he very rarely makes a
10 distinction, if ever, between first wave and second wave. He
11 talks about 70 million cars. He talks about 27 million cars.
12 Likewise, the Second Circuit, in its preamble to its ultimate
13 holding, talks about 27-odd million cars and 70 million cars.
14 There's never a distinction in the Second Circuit opinion
15 between first wave and second wave.

16 Then we have the last category, what we call the non-
17 ISD, non-ignition switch defect plaintiffs. Mr. Steinberg and
18 New GM says your second wave are in the same boat as the non-
19 ISDs. So there's only two categories, ISD, the 2 million cars,
20 and everything else, whether they involve a so-called ignition
21 switch or a seatbelt or a safety harness, you're all non-
22 ignition switch defect claimants. And where we think this is
23 critically important is on what it is the Second Circuit
24 announced that we think has broad permutations.

25 The Second Circuit talked about two things, lack of

1 due process, whether you need prejudice or not, and a finding
2 that there, in fact, was prejudice. We have a disagreement as
3 to whether or not that applies solely to the 2 million cars
4 that were in the first wave or whether it applies to all
5 ignition switch defect claimants. To a large extent, I think
6 that that needs to be a deferred issue because Judge Furman, in
7 addition to all of the other things he's looking at, is also
8 going to consider what additional discovery, if any, are the
9 plaintiffs entitled to or do they need with regard to the issue
10 of whether or not their defect, like the defect -- and I don't
11 know what the difference is between an ignition switch defect
12 and an ignition switch defect, but what additional discovery do
13 they need in order to demonstrate that their defect was known
14 or should have been known to Old GM, therefore leading
15 presumably to the same conclusion that your due process rights
16 were violated and that has an impact on whether or not the sale
17 orders injunction is binding.

18 THE COURT: Is that an issue that Judge Furman is
19 going to decide?

20 MR. WEISFELNER: I think Judge Furman's going to
21 decide what, if any, discovery you're entitled to, and by
22 implication, that may resolve the issue one way or the other
23 from the perspective of those folks who may need to
24 demonstrate, where Your Honor is so inclined, that their rights
25 depend on whether or not there was a due process violation

1 relative to them. But there's a second part of the Second
2 Circuit decision that I think is critical and is being
3 overlooked or was overlooked, probably not intentionally, by
4 Mr. Steinberg because he tends not to operate in that fashion,
5 and that's what happens to independent claims.

6 I think what the Second Circuit said, and it couldn't
7 have been clearer, is that regardless of what the bankruptcy
8 court did or thought it was doing, there is no jurisdiction for
9 a bankruptcy court to provide a get out of jail free card to a
10 buyer in a 363 sale with regard to its own independent post-
11 closing tortious conduct or failure to act that gives rise to a
12 claim. And as a consequence, everybody, the way we read it, be
13 they first wave, second wave, or non-ISD, continues to have the
14 right, always had the right notwithstanding what Judge Gerber
15 may have written, to pursue independent claims against New GM,
16 so long as it involves New GM's conduct and doesn't rely on
17 conduct by Old GM that would have been part of retained
18 liabilities, as that term is defined in the sale order.

19 So we'll brief it all, and the only issue we had
20 between their articulation of what they call the Pillars issue
21 and then the second issue that talked about the impact of prior
22 decisions and whether people appealed them or not and therefore
23 whether they have an entitlement to go forward, we thought
24 those two issues should be merged. And in merging them, you
25 could articulate the issue much more clearly. And again, I

1 think I --

2 THE COURT: I think -- maybe I'm misunderstanding. I
3 think it would be helpful to me if those issues were separately
4 identified as issues and the briefs treat them separate -- I
5 mean, to the extent you think that it's decided by some other
6 point in the argument. I just think it would be helpful to me
7 to have the issues separately identified rather than folded
8 together.

9 MR. WEISFELNER: And again, the only folding together
10 we were doing is they articulated the Pillars decision as
11 narrowly focused on what is an ignition switch defect
12 plaintiff. They'll argue that an ignition switch defect
13 plaintiff, by reference to the agreed-upon findings that we all
14 stipulated to in advance of Judge Gerber determining the four
15 threshold issues, was, in fact, limited to those cars that were
16 in the first-wave recall. There was no debating that. That's
17 what the stipulation says.

18 So I'm not sure why we need to brief that separate
19 issue other than they want to then, it seems to me, expand that
20 and say the second-wave ISDs are therefore properly defined as
21 non-ISDs because they weren't in the first wave. I don't know
22 why Your Honor needs briefing on that. Pick up the stipulated
23 facts.

24 What flows from that is really contained in the
25 second issue, which we've all agreed on, and that is has anyone

1 lost rights by virtue of their failure to appeal or -- in
2 actuality, we all appealed. It's a question of what issues did
3 we articulate on the appeal and to what extent did that failure
4 to appeal, in effect, get excused because of a change in the
5 law or -- it's kind of hard for me to stand here and tell you
6 that what the Second Circuit did was change the law. I think
7 they followed Travelers-Manville, so I'm not sure how that fits
8 into a 60(d) context. I don't think they changed the law. I
9 think they rearticulated it.

10 THE COURT: Well, they changed the law from what
11 Judge Gerber ruled.

12 MR. WEISFELNER: They certainly changed the law as it
13 was articulated by Judge Gerber. That's correct.

14 So, Your Honor, the only other points I would make,
15 because this is a procedural matter, is Mr. Steinberg made
16 reference to a lot of things that Judge Gerber said in
17 anticipation of his retirement about bringing people together.

18 THE COURT: Easy for him to say when he was leaving.

19 MR. WEISFELNER: Well, easy for him to say because I
20 was here and I didn't remember Judge Gerber suggesting that. I
21 remember GM filing successive motions to enforce.

22 THE COURT: Let me ask you this. Do you -- are you
23 in agreement with Mr. Steinberg about this order to show cause
24 procedure to bring everybody here?

25 MR. WEISFELNER: Your Honor, I understand the

1 concerns that have been expressed by some of my plaintiff
2 bankruptcy representative brethren. I hear it, I understand
3 it. I think it's overwrought, quite frankly. I think the
4 procedure can, should, and ultimately will be designed in such
5 a fashion as to this is a case about due process to a very
6 large extent. We're not going to make a due process mistake
7 collectively, and I think an order to show cause is sufficient
8 in that regard.

9 THE COURT: Okay.

10 MR. WEISFELNER: Unless Your Honor has any other
11 questions.

12 THE COURT: We're separately going to talk about the
13 late claim issue, but we'll get to that.

14 MR. WEISFELNER: Thank you.

15 THE COURT: Mr. Weintraub.

16 MR. WEINTRAUB: Thank you, Your Honor. William
17 Weintraub for the ignition switch pre-closing accident
18 plaintiff and certain post-closing non-ignition switch
19 plaintiffs. I'm going to stifle -- I think I have successfully
20 stifled any urge to respond to a lot of the argument that was
21 made by Mr. Steinberg. That will be for another day, so I'll
22 reserve right with respect to that.

23 The only point then that I want to make, in addition
24 to also saying that I believe the order to show cause procedure
25 is an appropriate procedure --

1 THE COURT: I mean, it does seem, to me, to work.
2 When I read the objections that said adversary proceeding, that
3 just is not right.

4 MR. WEINTRAUB: Right. We always thought that it
5 works so long as people actually receive it.

6 THE COURT: Yes, as long as they receive notice.

7 MR. WEINTRAUB: And it is clear what is going to
8 happen, which was --

9 THE COURT: Service under Rule 7004.

10 MR. WEINTRAUB: Exactly. As you may recall, our
11 quibble with the September 2015 scheduling order -- not order
12 to show cause, but scheduling order -- was it was far less than
13 clear that people needed to appear or risk losing their rights.

14 The only point I'd like to make, Your Honor, is at
15 page 16 of the status report, I raised two additional -- what I
16 believe should be threshold issues that don't require
17 discovery. I actually think that (2) is the independent claim
18 argument that Mr. Weisfelner was just making. So -- and I
19 think Your Honor was in agreement with that, so I don't think
20 we -- any of us have an issue with (2) being an appropriate
21 threshold issue. I also believe that (1), which also doesn't
22 require discovery, is an appropriate threshold issue. Both of
23 these issues relate to post-closing accidents, which we believe
24 are in the nature of future claims. So then you have a very
25 different due process issue than the one addressed by Judge

1 Gerber, which is a known or unknown creditor of Old GM.

2 THE COURT: Right.

3 MR. WEINTRAUB: These are not yet --

4 THE COURT: Judge Bernstein -- I can't -- what's the
5 name of this case that he wrote?

6 MR. WEINTRAUB: Grumman Olson.

7 THE COURT: Yes, Grumman Olson, he got affirmed in
8 the district court, just the future claim issue.

9 MR. WEINTRAUB: Exactly, Your Honor, and I think that
10 would be ripe as a threshold issue, as well.

11 THE COURT: Okay. I may come to regret it, but it
12 seems to me that for the purpose of what we're gearing up to
13 do, certainly for this first round of briefing, to the extent
14 the parties agree that no discovery is required, I think the
15 issues should be included. I, you know, doubt -- disagree
16 strongly about what the outcome ought to be and I don't think
17 that you all should spend weeks word smithing exactly how it
18 comes in. You ought to frame them neutrally, but the way that
19 parties could understand what the issue is because ultimately,
20 it's going to -- you know, you're all going to brief it, and
21 I'm going to have to decide it.

22 The one thing I want to be careful about, I should
23 have said this before, is -- and I've had a few conversations
24 with Judge Furman. He and I haven't spoken in a while. I
25 actually put in a call to him yesterday. I haven't heard back

1 from him yet. I want to be very careful not to consider or
2 decide issues that he thinks properly belong before him. And
3 to the extent that there does appear to be some overlap, I just
4 want to be sure that he knows what issues are being raised
5 here. And if he has questions about why them not being raised
6 in -- you know, that they more appropriately should be raised
7 before him, that's fine with me. But -- so, you know, Mr.
8 Steinberg has certainly filed on this docket copies of the
9 correspondence that go to Judge Furman, so I see some of that
10 and I do look at it, but I want -- that's what I -- I just -- I
11 want to be -- I got a little nervous when I read the status
12 report, but when I see that some of these issues seem to be
13 before Judge Furman, I don't want to get caught up in what
14 should he decide, what should I decide.

15 MR. WEINTRAUB: And, Your Honor, that -- actually,
16 your comment triggers something that I had written down earlier
17 that I don't think we need to address today because Mr.
18 Steinberg described it as a "maybe later" issue, and that's the
19 successor liability issue. I think that --

20 THE COURT: That was what caught my attention when I
21 saw that in there.

22 MR. WEINTRAUB: I think if this Court decides that
23 the successor liability bar is not enforceable, the question of
24 whether or not New GM is a successor should be something for
25 the trial court to determine and not the bankruptcy court.

1 Unless you have any questions for me, Your Honor.

2 THE COURT: I think that's it for now.

3 MR. WEINTRAUB: Thank you, Your Honor.

4 THE COURT: Okay. Come on up.

5 MR. PELLER: Your Honor, Gary Peller for the Elliott,
6 Bledsoe, and Sesay --

7 THE COURT: I keep reading your name in all the
8 papers, but this is the first time I've actually set eyes on
9 you, sir.

10 MR. PELLER: Nice to meet you, Your Honor.

11 We believe that the -- we disagree about the need for
12 immediate discovery and believe that it's important to
13 distinguish two procedural aspects of the parties before you.
14 One part of the proceedings before you have to do with the
15 remand from the court of appeals, and that remand contained a
16 mandate. That mandate reversed -- affirmed part and reversed
17 many parts of Judge Gerber's order, but only vacated and
18 remanded for one issue, and that's whether the non-Delta
19 ignition switch plaintiffs have a due process -- can make out a
20 due process violation that would enable them to proceed with
21 successor liability claims against New GM. We believe that
22 that issue is -- should be the threshold issue for the remand
23 part of these proceedings. It's specifically what the Second
24 Circuit remanded for, and we believe that there's nothing to be
25 gained by delaying discovery on that issue forthwith.

1 I believe that Mr. Steinberg might have mistaken when
2 he said that Judge Furman is considering discovery on that due
3 process issue in the MDL. I'm not -- I've followed the MDL
4 proceedings quite closely, and I'm not aware of Judge Gerber
5 approving discovery on due process issue.

6 THE COURT: Judge Furman.

7 MR. PELLER: I'm sorry, Judge Furman approving
8 discovery on a judge -- on a due process issue.

9 Another aspect is that even -- there's no point, as
10 we see it, in awaiting Judge Furman's successor liability
11 rulings. Those successor liability rulings will only apply to
12 the parties of the fourth amended consolidated complaint, which
13 includes a subset of the MDL plaintiffs, but of course, doesn't
14 include any of the state plaintiffs and the various --

15 THE COURT: Well, you know, I have found many of
16 Judge Furman's decisions, not only in Motors Liquidation, but
17 in other cases, quite persuasive. So whether one of his
18 decisions is binding, it may well be persuasive. And if and to
19 the extent the issues are before me, I might -- you know, I
20 might well be inclined to follow him. So the briefing is
21 underway before Judge Furman on the successor liability issue.
22 No briefing has occurred here yet.

23 MR. PELLER: With due respect, Your Honor, the --
24 those issue will never be before you. The question of whether
25 plaintiffs make out a successor liability claim against New GM

1 is always going to be for a trial court hearing the claims, not
2 for the bankruptcy court. The issue before you is whether non-
3 Delta ignition switch plaintiffs --

4 THE COURT: Well, I thought that the circuit said --
5 I don't have it -- didn't pull the opinion out with me today,
6 but I thought that Judge Chin made the point that -- which I
7 felt was the trend in authority, but not fully resolved in the
8 Second Circuit -- that a bar on successor liability claims is
9 proper -- can be proper. The question was here whether
10 violation of due process prevented it from being enforceable,
11 but that a plan or a sale order may include a prohibition on
12 claims of successor liability. Do you disagree with that?

13 MR. PELLER: No, I don't, Your Honor. I may have
14 misunderstood your earlier comment. I thought that you were
15 saying that you would be asked to rule on the very same issue
16 that Judge Furman's about to rule on.

17 THE COURT: No, I was concerned. I saw the reference
18 in the status report to Judge Furman -- briefing going on
19 before Judge Furman on successor liability and the suggestion
20 that there were going to be issues before me, and that was what
21 I was concerned about because I saw -- I don't want to be in
22 the position of dealing with issues that are pending before
23 Judge Furman.

24 MR. PELLER: Our only point, Your Honor, is that the
25 question of whether successor liability can be asserted under

1 state law will not determine the question that is before you
2 that's remanded by the Second Circuit mandate, and that is
3 whether non-Delta ignition switch plaintiffs can make out a due
4 process violation to assert any claims --

5 THE COURT: What's the discovery you want to
6 undertake, Mr. Peller?

7 MR. PELLER: GM's -- Old GM's knowledge of and -- or
8 questions of whether Old GM should have known, the same
9 questions that Second Circuit ruled on with respect to the
10 Delta ignition switch with respect to non-Delta ignition switch
11 plaintiffs. So for example, we assert a power steering defect,
12 and we alleged, you know, many, many paragraphs in our
13 complaint that show that Old GM knew and that when New GM came
14 into existence, it also knew of these defects. So we would be
15 arguing that, for example, with respect to the non-Delta
16 ignition switch power steering defects, those plaintiffs also
17 ought to be able to assert successor liability claims against
18 New GM because they also were victims of a due process
19 violation with respect to the lead up to the sale order.

20 Your Honor, if I could now move to the order to show
21 cause questions. And I've listened carefully to Your Honor's
22 exchange with counsel before me.

23 This is what I see the problem with that procedure.
24 There is a certain number of plaintiffs -- of parties who are
25 here before Judge Gerber litigating the four threshold issues.

1 Those parties aren't a secret. They didn't include categorical
2 all ignition switch, all pre-accident [sic] accident
3 plaintiffs. They included particular parties who were
4 represented by designated counsel through the co-lead counsel.
5 Those are particular parties that the co-lead counsel
6 represents. The co-lead counsel do not, for those purposes,
7 represent all parties in the MDL, but more importantly, those
8 parties are just listed on the Judge judgment. They're --

9 THE COURT: May I ask you this, Mr. Peller? Do you
10 agree that the Court can consider a contested matter in which
11 all parties are properly served that addresses the issue of
12 whether the injunction in the sale order is enforceable against
13 them?

14 MR. PELLER: Your Honor, I believe that the
15 procedurally appropriate thing is GM did for all the parties --

16 THE COURT: Could you answer my question?

17 MR. PELLER: Yes, but I think procedurally
18 appropriate is the initiation of --

19 THE COURT: Mr. Peller?

20 MR. PELLER: Yes, sir?

21 THE COURT: Let's deal first with my question, and
22 then I'll let you expand.

23 MR. PELLER: Yeah. Yes, Your Honor.

24 THE COURT: You agree that an order to show cause
25 properly served on all parties that New GM seeks to bind is a

1 proper procedure to raise the issue in this court, bind under
2 the injunction in the sale order?

3 MR. PELLER: No, I do not, Your Honor.

4 THE COURT: Why not?

5 MR. PELLER: Judge Gerber did rule, and it was not
6 appealed on the --

7 THE COURT: I don't want to know about Judge Gerber.

8 I'm --

9 MR. PELLER: Okay. Your Honor --

10 THE COURT: I may have the issue of whether Judge
11 Gerber's rulings -- to what extent are those enforceable
12 against, but even if I concluded they weren't, I may be able to
13 decide as a fresh proposition. I may find Judge Gerber's
14 rulings to be persuasive. It's the point I make about Judge
15 Furman. His decisions may not be binding on parties in matters
16 before me, but I may find them persuasive. I may find Judge
17 Gerber's decisions persuasive. So if -- to the extent that
18 parties are given -- and I know this is disputed because Mr.
19 Steinberg says they were given proper notice, and I'm going to
20 have to decide that, but even if I assume that they weren't, if
21 they're properly served now, an order to show cause is a proper
22 method of raising the issues before me whether those parties
23 are bound by the injunction in the sale order. Do you agree
24 with that?

25 MR. PELLER: I don't, Your Honor. I believe --

1 THE COURT: Okay. Tell me why.

2 MR. PELLER: I believe that the appropriate procedure
3 -- we believe the appropriate procedure, because they're asking
4 for injunction, was the initiation of an adversary proceeding
5 --

6 THE COURT: What about 7001(7), which specifically
7 seems to permit the procedure? It's typically by motion, and
8 order to show cause is the same effect as a motion. How do you
9 distinguish what 7001(7) provides?

10 MR. PELLER: Because an order to show cause puts the
11 onus on the served party to come in and to prove, as if it were
12 presumed and the default was that they were --

13 THE COURT: Oh, no. New GM may have the onus of
14 proving, so an order to show cause doesn't set the burdens. It
15 just says who's got to come before me. And what I anticipate
16 is that a briefing schedule will have New GM going first and
17 parties having an opportunity to file objections and then New
18 GM filing a reply. I'm not going to dictate. I'm going to
19 leave it to counsel to try and work out an omnibus briefing
20 schedule, but you seem to be confusing -- an order to show
21 cause doesn't determine who has the burden. It sets forth --
22 it brings before the Court a -- in this case, what I believe --
23 what is obviously a contested matter, and there will be a
24 scheduling order prepared. It would include briefing, which I
25 expect counsel to work cooperatively, and I assume they will,

1 as to what the schedule is, but you haven't convinced me why
2 7001(7) doesn't -- the exception in that doesn't apply so that
3 it does not have to be by adversary proceeding.

4 MR. PELLER: I don't -- I understand that it can be
5 by a contested matter, Your Honor, but I believe --

6 THE COURT: And a contested matter can be triggered
7 by an order to show cause.

8 MR. PELLER: We believe that --

9 THE COURT: You disagree with -- do you have any
10 authority that says that a contested matter can't be triggered
11 by an order to show cause?

12 MR. PELLER: No, I don't, Your Honor. The -- we
13 believe that the appropriate procedure is the one that New GM
14 filed -- that was filed in the past, and that is to file a
15 motion to enforce that carries as a motion all the procedural
16 rights that are guaranteed under the Federal Rules of
17 Bankruptcy.

18 THE COURT: I hear you. I disagree with you.

19 MR. PELLER: Okay.

20 THE COURT: Okay.

21 MR. PELLER: And I accept that, Your Honor. So in
22 sum, Your Honor, we believe that the other problem with the
23 order to show cause procedure is that by that procedure, New GM
24 is just going to sweep in everyone who's filed kind of
25 complaints against New GM.

1 THE COURT: They are.

2 MR. PELLER: Yes, exactly. And that is improper
3 given that the remand proceedings that involved the parties who
4 litigated the four threshold --

5 THE COURT: I have --

6 MR. PELLER: -- issues didn't involve all these other
7 parties out in the universe.

8 THE COURT: Mr. Peller, Motors Liquidation is pending
9 before me. Judge Gerber retired, the case got transferred to
10 me. Whether it's strictly within the four corners of the
11 remand or whether it's a matter that's properly raised in the
12 pending matter before me in the Motors Liquidation, you know,
13 but I only want to decide these questions once, to the extent
14 that that's possible. I want to give everybody a fair chance
15 to argue their positions, and it may be that not everything
16 that gets briefed to where the parties think can be resolved
17 without discovery, maybe it can't. I don't know. All right.
18 I'm not deciding any of that now.

19 But there -- I understand your objections. There
20 seems to be a fairly substantial broad agreement that there are
21 a group of threshold issues that can properly be brought before
22 the Court using this OFC procedure. I agree the procedure is a
23 correct one. All right. What the outcome of those issues, I
24 don't know.

25 MR. PELLER: Of course, Your Honor, and I'll conclude

1 with this. We also disagree with the identification of the
2 threshold issues in that we believe that the pressing threshold
3 issue is that identified by the court of appeals mandate in
4 that --

5 THE COURT: You don't agree with the issues they did
6 identify. You think that the one and only threshold issue
7 should be due process with respect to non-ignition switch
8 parties?

9 MR. PELLER: Well, Your Honor, the question is how
10 much GM is going to be allowed to simply relitigate the court
11 of appeals decision over and over and over again. They've got
12 listed one of the issues as whether used car purchasers are
13 precluded from suing under the sale order. The Second Circuit
14 clearly ruled on that. They have another issue of independent
15 claims, and I think that -- I think that this Court should --

16 THE COURT: If you're right, Mr. Peller, it's going
17 to be a very short piece of an opinion, okay.

18 MR. PELLER: Okay. Thank you, Your Honor.

19 THE COURT: But what I want to do is I want to get
20 before me, if possible at a single proceeding, all of the
21 relevant parties, and I think the relevant parties are well
22 beyond what you think are the relevant parties, and I want
23 briefing and I want, from the plaintiffs' side, I don't want 47
24 briefs. I want -- you know, Judge Bernstein, in Madoff, has
25 entered some orders for an omnibus briefing. I've usually not

1 had a problem with this when I've had cases with lots of
2 parties, so that there's one main brief, and if people have
3 some specific issues they think are relating only to them, they
4 can file short briefs, but I don't expect to get a separate
5 brief from everybody who's conceivably involved. I want to
6 allow enough time in the briefing schedule, from the
7 plaintiffs' standpoint, that they can try and get some
8 coordination so that people will sign on to one main brief, and
9 if there are some small briefs that deal with issues, fine.
10 But I'm not going to permit everybody who conceivably is
11 involved to be filing separate briefs on all the same issues.
12 I'm not going to read them all.

13 MR. PELLER: Your Honor, you may be aware that the
14 plaintiffs' group has had quite a bit of conflict over what
15 issues to present, what legal theories to present, and so I
16 hope we can convince you, if need be, that at least we should
17 be permitted to file independent papers from designated
18 counsel.

19 THE COURT: Well, you're not going to convince me,
20 all right. To the extent there are common issues that are
21 going to be addressed, I don't -- you know, your paper is not
22 going to get read if that's -- if you're filing on the same
23 issues as everybody else. So there ought to be enough time
24 built into the schedule that whether it's Mr. Weisfelner or Mr.
25 Weintraub, whoever's going to -- what group is going to take

1 the lead, but they can circulate the draft, they can get
2 comments and try -- and if you've got separate issues that are
3 not in the common issues, that are identified as issues for
4 this first phase, fine. They're going to be -- they're not
5 going to be 50-page briefs on those, all right.

6 All right. Let me hear, any other counsel want to be
7 heard?

8 MR. PELLER: Thank you, Your Honor.

9 THE COURT: Anybody on the phone wish to be heard?

10 MR. BABCOCK: Your Honor, Russell Babcock on behalf
11 of Benjamin Pillars. I mean, obviously, you know, there's --
12 the segment which appeared on page 9 of the statement kind of
13 identifies New GM's take on what Judge Furman did. Obviously,
14 I guess -- the only thing I guess I would add is there is
15 considerable disagreement about a lot of things, but one thing
16 Judge Furman was pointing out, at least with regards to the
17 Pillars issue, was that obviously depending on how the ultimate
18 outcome of the -- whether or not there is an application filed
19 with the Supreme Court and how that is resolved one way or the
20 other may shape the issue that pertained to my particular
21 client. He identified three different scenarios at least that
22 he envisions.

23 I don't know how Your Honor wishes to proceed with
24 those issues. Obviously, I think Judge Furman envisioning this
25 being an issue that would addressed once the dust has settled

1 on the appellate process on that issue. So that's kind of
2 where we're at. Obviously, Judge issued his ruling -- Judge
3 Furman did, at least, and that's kind of where we're at.

4 THE COURT: Thank you, Mr. Babcock.

5 Anybody else on the phone?

6 MR. LEDFORD: Your Honor, this is Kris Ledford on
7 behalf of the Pope plaintiffs. I've set out, and I've tried to
8 be concise, my position on some of these issues, but I'm only
9 speaking up now, Judge, because of what you just expressed,
10 that you don't want a bunch of briefs.

11 Your Honor, some of these issues, while they may
12 appear common, they -- the argument for my clients is different
13 than it is for the economic loss, especially when we get into
14 discussing how we're going to define terms. And I set that
15 out. I won't make the argument now, but I set it out for you
16 how there was a specific definition of non-ignition switch
17 plaintiffs that now New GM wants to make my clients part of and
18 therefore be bound by these prior orders when we were never
19 part of that definition that was used by the Court. And so I
20 would respectfully ask that when we -- while you may set out a
21 procedure that says there's going to be one lead brief that
22 please allow us, as easily as possible, especially those of us
23 that are not up there, that don't practice before you, allow us
24 to file some sort of supplement or some sort of paper to
25 protect our clients' interest and how we get treated.

1 THE COURT: Mr. Ledford, as I said, to the extent
2 that you believe there are -- take that, for example, the issue
3 you identified. You believe it's an individual issue as to
4 your client, may apply to others, as well. I'm not precluding
5 a brief on that issue. I don't -- you know, so let me make
6 clear. I impose page limits on briefs. I'm not going to set
7 the page limit today. All right. I think that the, you know,
8 New GM and the -- certainly, the co-lead counsel for the
9 plaintiffs -- and I hope I'm not insulting anybody with that
10 label, okay -- will confer about an appropriate page limit. I
11 would -- you know, there are a lot of issues. My normal 25-
12 page rule is not going to apply, but I don't want -- I really
13 would prefer to avoid 100-page briefs, okay. But I want
14 counsel to confer about it.

15 On the point that Mr. Ledford raises, in cases where
16 I have had separate briefs because there are parties that
17 believe there are separate issues, I've more typically imposed
18 a 10 or 15-page limit on those briefs. Shorter is better than
19 longer, okay. I do read everything that comes before me, but
20 I'm not trying to preclude any party from making an argument.
21 If you believe you have a unique argument, I'll permit it, but
22 I'm not going to permit a 30-page brief on some, you know,
23 narrow issue that you think applies to yours. There's a lot --
24 your client -- there's a lot of issues.

25 All right. Let me -- anybody else wish to be heard

1 on the phone?

2 MR. LEDFORD: Your Honor, I -- this is Kris Ledford
3 again -- I have one other issue that is listed on page 15. And
4 it's the other party's position. It's the Pope plaintiff item
5 number 1. And I didn't get to express how that was stated. I
6 just want to raise it with you. Here's what that's all about,
7 Your Honor. And I don't know if you want -- I'd like for this
8 to get resolved sooner rather than later, but when I received a
9 letter from New GM's counsel in May of this year that said, you
10 are violating the bankruptcy stay -- or the injunction, I took
11 it to heart. I then got a motion filed against me in June, and
12 I stopped discovery. I was ready to file a motion to compel on
13 a bunch of important issues, but I didn't file it because I was
14 threatened with all kinds of things if I proceeded.

15 Notwithstanding the fact that I stopped in the state
16 court, New GM, in the state court action, has taken additional
17 discovery. They've taken depositions. And I feel like it's
18 unfair. I'm not close to trial, Judge. I'm trying to get some
19 basic discovery done, and I'm going to have to file a motion to
20 compel to get it done. And all I'm trying to do is get
21 permission to go forward on that and not be faced with the, oh,
22 there's the bankruptcy proceeding, therefore you can't do it.
23 That's what I'm trying to avoid. I need to get my case moving
24 in the state court and not wait another year before I file a
25 motion to compel on some basic written discovery.

1 THE COURT: What court is your action pending
2 innocent?

3 MR. LEDFORD: It's in Oklahoma in Muskogee County.

4 THE COURT: Okay. I'm going to ask Mr. Steinberg
5 about it. I take your point to heart, and I'm not ignoring it.
6 We'll -- any other points you want to make, Mr. Ledford?

7 MR. LEDFORD: No, sir.

8 THE COURT: All right. Anybody else on the phone
9 wish to be heard?

10 All right. Mr. Steinberg, and then Mr. Weisfelner.
11 Address this discovery issue because I'm reading on page 15,
12 and you say Pope plaintiffs are free to pursue any discovery
13 they choose in the trial court.

14 MR. STEINBERG: Right. We were trying to deal with
15 this issue in connection with the status report so we would
16 have one less paragraph in the status report. New GM's
17 position is if he wants to take discovery -- because he's a
18 post-sale accident, so part of it, as an assumed liabilities,
19 always been entitled to take that type of discovery. The issue
20 is, is that he's a non-ignition switch post-sale accident, and
21 he's asking for punitive damages. So the -- to the extent that
22 some of the discovery that he wants to take is not related to
23 the accident, but is related to the type or the ability to pay
24 because of punitive damages, we were saying that he shouldn't
25 be able to go forward.

1 Our position that we set forth in the status report,
2 not to burden Your Honor with all the issues that we otherwise
3 have, is that he could argue whatever he wants in his state
4 court action before the Oklahoma judge, and we reserve our
5 right to tell the Oklahoma judge that he's pursuing punitive
6 damages in -- if the discovery that he wants is tailored to
7 just the punitive damage aspect, we reserve the right to tell
8 the Oklahoma judge that that's a violation of Judge Gerber's
9 December judgment, and then the Oklahoma judge will decide,
10 based on our presentation, whether that's correct or not.

11 So we were prepared to take this entire issue away
12 from Your Honor, but argue that --

13 THE COURT: So you would -- let me just cut through
14 this. You agree that New GM will -- is prepared to address the
15 issue before the state court judge in Oklahoma about the scope
16 of permissible discovery in the Pope action.

17 MR. STEINBERG: That's correct.

18 THE COURT: All right. Are you satisfied that with
19 [sic], Mr. Ledford?

20 MR. LEDFORD: Well, what I'm trying to get is them to
21 make -- they can make the argument that it's premature because
22 of the Second Circuit ruling.

23 THE COURT: No. Mr. Ledford, you want your judge to
24 be able to decide the issues. As Mr. Steinberg said, he's
25 going to leave it to your judge to decide the issues.

1 MR. LEDFORD: Okay. That -- I had asked directly
2 whether or not they're going to argue premature versus
3 forbidden, and they wouldn't answer that. What I heard him say
4 is --

5 THE COURT: You ask in Oklahoma, not before me, Mr.
6 --

7 MR. LEDFORD: -- they're just going to argue
8 premature.

9 THE COURT: I'm not going to -- okay. On the issue
10 of what's the permissible scope of discovery in your action in
11 Oklahoma, ti's out of my hands. It'll be dealt with with the
12 judge in Oklahoma. Is that right, Mr. Steinberg?

13 MR. STEINBERG: That is correct, but we're going to
14 argue what happened in the bankruptcy court.

15 THE COURT: Yes, but you're going to argue it before
16 the judge --

17 MR. STEINBERG: In Oklahoma.

18 THE COURT: -- in Oklahoma.

19 MR. STEINBERG: That's correct. He'll set what he
20 wants to.

21 THE COURT: Okay. All right. So -- all right.
22 Anybody else on the phone wish to be heard? No.

23 Go ahead, Mr. Steinberg. Let's do --

24 MR. STEINBERG: All right. Your Honor has given us a
25 lot of time, and I don't really want to spend a lot more time

1 because I guess Your Honor will give us guidance at the end as
2 to how you want us to proceed. I just want to highlight a
3 couple of things that were said, just so it's clear. The
4 reason why -- and I think Your Honor had said that you wanted
5 to see what I labeled the first issue, the Pillars issue, as a
6 separate issue. It's because there actually was a back and
7 forth with Judge Furman.

8 I'm not sure whether you -- whether we actually have
9 given it to you, but we actually went through a briefing
10 schedule, letter briefs that were submitted by the Pillars'
11 counsel and by New GM in the MDL as to whether the Second
12 Circuit opinion impacted this appear because they were an
13 ignition switch or a non-ignition switch plaintiff. So --

14 THE COURT: This is on page 9 of the --

15 MR. STEINBERG: That's right. Judge Furman said,
16 either you're going to win because you convinced the Second
17 Circuit to reconsider, or if it gets down to the bankruptcy
18 court, I want to hear from Judge Glenn on that issue. So
19 that's why that's a separate issue. It's --

20 THE COURT: I'd rather hear from Judge Furman on it,
21 but I don't know.

22 MR. STEINBERG: But that's the reason why it's
23 separate, and we think it should be separately briefed.

24 THE COURT: The issue, okay -- look, we still have to
25 deal with the late claim. I'm going to deal with that in a few

1 minutes, but with respect -- what I want you to do is sit down
2 and provide me with a single list --

3 MR. STEINBERG: I can do that.

4 THE COURT: -- of the threshold issues. And, you
5 know, I think you're all -- you all have a different agenda for
6 today, okay. Stop word smithing it to this point. Yeah, the
7 issues have to be fairly identified, but we're going to go
8 forward with -- and then negotiate proposed briefing schedule.
9 As I said, I think on the plaintiffs' side, because I don't
10 want separate briefs from everybody who's going to get served,
11 you need to build in enough time that they can circulate. The
12 lead counsel who are going to -- I assume are going to take the
13 lead in putting the brief together can circulate it and
14 hopefully get comments. That's a more time-consuming process
15 than you have on your side. So take that into account when you
16 work out the schedule.

17 MR. STEINBERG: Your Honor, to the extent that the
18 threshold issues have been numbered, I'm pretty sure that we'll
19 get to closure on identifying how the issues should be spelled
20 out in the order to show cause for one, two, and three. The
21 fourth one --

22 THE COURT: What page?

23 MR. STEINBERG: One, two -- I'm on pages -- starting
24 on page 9 through 14. I think we can fairly well, in talking
25 to designated counsel, work with the language we have and the

1 language that they've included in the report and in the
2 appendix to get to that. I'm pretty sure we can get there.
3 Item four, we'll need some guidance on how you want to approach
4 the --

5 THE COURT: We're going to do that now.

6 MR. STEINBERG: -- the late proof of claim.

7 THE COURT: Yes.

8 MR. STEINBERG: The issue that Goodwin Proctor
9 identified on page 16 as two additional threshold issues, I
10 think that --

11 THE COURT: Include them.

12 MR. STEINBERG: I think we can include them --

13 THE COURT: Include them.

14 MR. STEINBERG: Okay.

15 THE COURT: My view is if they -- I have no doubt
16 that Mr. Weintraub believes that these are threshold issues.
17 You may disagree. You'll brief them.

18 MR. STEINBERG: Okay. The only thing that I would
19 say on those issues, because I wasn't going to quarrel about
20 briefing them, is that sometimes these two issues, the devil is
21 in the detail of what they're talking about. And there, it
22 would almost be better to have a test case that illustrates
23 these two points so that we can then brief the issue with
24 regard to a test case. Because inherent in these questions is
25 what is actually an independent claim and whether they're

1 really asserting something that's independent in the context of
2 what Judge Gerber said.

3 THE COURT: Well, sit down with Mr. Weintraub and see
4 if you can work out the agreement. Otherwise, it's going to --
5 we're going to include these issues.

6 MR. STEINBERG: Okay. Then I think -- then other
7 than that, the only other thing that I would just point out
8 just to -- so Your Honor had it, and I don't have it exactly to
9 the WestLaw cite, but in the Second Circuit opinion on this
10 issue that you've been talking about with Mr. Peller about
11 whether you can do this by order to show cause, there is a
12 specific reference. The Court ruled on that.

13 THE COURT: I'm satisfied I can do it by order to
14 show cause.

15 MR. STEINBERG: And finally, just the final comment
16 I'll have is I think Mr. Peller attributed some comment to me
17 that was really something that Mr. Weisfelner said. You should
18 -- Your Honor should understand that there is ongoing discovery
19 right now in the MDL on second wave discovery. I mean, that is
20 happening.

21 THE COURT: I addressed Mr. Peller's point, that he
22 believes the non-ignition switch plaintiffs are entitled to
23 discovery on the due process issue, which is not resolved by
24 the circuit, which is remanded here. Why shouldn't that
25 discovery go forward?

1 MR. STEINBERG: The issue that he's referring to here
2 -- he's -- I think he's talking about economic loss cases, and
3 there, we say that if Judge Furman rules on successful
4 liability in favor of either side, that will help decide
5 whether you need to take discovery at all. Also, the issue of
6 discovery on ignition/non-ignition switch cases, whether you
7 use my nomenclature or Mr. Weisfelner's nomenclature, is
8 something that has been orchestrated and talked about in the
9 MDL before Judge Furman with lead counsel.

10 What you have here is Mr. Peller, who is in -- who's
11 got 14 clients, who's not part of the executive counsel, who's
12 trying to use this court and this process to try to get
13 discovery when Judge Furman has tried to organize the discovery
14 around that situation.

15 THE COURT: All right. Okay. Now, let's talk about
16 the --

17 MR. WEISFELNER: Can I just comment very --

18 THE COURT: Go ahead, Mr. Weisfelner.

19 MR. WEISFELNER: -- briefly before we do that? And
20 Arthur was correct. Mr. Peller made reference to Mr. Steinberg
21 when I think he meant to make reference to me.

22 Here are the facts as best as I know them. There is
23 discovery that's ongoing in the MDL between New GM and lead
24 counsel. It does involve, to a very large extent, the second
25 wave ISDs and whether those defects were known at a point in

1 time. There will -- there has been and will no doubt continue
2 to be disputes between New GM and lead counsel as to the scope
3 of that discovery, how much more of that discovery is going to
4 be allowed, all of which is before Judge Furman.

5 THE COURT: And I'm going to leave it before Judge
6 Furman.

7 MR. WEISFELNER: And, Your Honor, just to sort of
8 frame the issue as to why discovery in this Court is, from our
9 perspective, terribly premature, start with the proposition
10 that the Second Circuit said for certain plaintiffs, and maybe
11 said it for everybody in the world, but the sale order is non-
12 effective because of a violation of due process. Well, that's
13 a victory.

14 Now, what does one do with that victory? If the sale
15 order is not binding, then presumably you can sue New GM on
16 account of Old GM's actions and conduct. Well, under what
17 theory would you do that? The one that comes to mind, and I
18 have a very narrow mind, is successor liability. Well, if
19 Judge Furman decides in the context of the pending proposed
20 class action that successor liability is not available in the
21 16 states that are pending, it may very well be that from the
22 perspective of lead counsel in the MDL, we say, well, then, who
23 cares whether or not there's a due process violation for
24 anybody whose due process violation hasn't been determined
25 because even if we win, it's a pyrrhic victory.

1 THE COURT: Believe it or not, Mr. Steinberg
2 convinced me that -- not to, at this stage, to have discovery
3 on the due process issue.

4 MR. WEISFELNER: Okay. The only other point that I
5 want to make, Your Honor, is one loves a challenge, even to the
6 point of having to hurt cats. We have attempted in the past,
7 on multiple occasions, to work with Mr. Peller. Sometimes
8 we're successful.

9 THE COURT: I think you can leave this part out,
10 okay, but stay up there, Mr. Weisfelner because I want to talk
11 about the late proof of claim.

12 MR. WEISFELNER: Yes, sir.

13 THE COURT: And this is on page 14 of the status
14 report. I've been surprised that you haven't filed -- you told
15 me a long time ago that you were going to file a motion for
16 leave to file a late proof of claim and you haven't yet. I
17 wasn't enamored of what was suggested in the status report. It
18 seems to me, file your motion for late proof of claim, let them
19 oppose it. I mean, I thought that -- maybe I have to clearly
20 go back and read the second circuit opinion, but I thought they
21 reversed Judge Gerber on equitable mootness. They specifically
22 talked about the accordion feature of the plan. At this stage,
23 what's the amount of the allowed claims in the Old GM
24 bankruptcy?

25 MR. WEISFELNER: Approximately -- someone will

1 correct me, I'm sure, if I'm wrong -- about \$32 billion worth
2 of allowed claims.

3 THE COURT: So close to the 35 billion threshold for
4 triggering the accordion?

5 MR. WEISFELNER: Give or take, \$3 billion. That's
6 correct.

7 THE COURT: That's real money to me, but you know,
8 okay. So why don't you --

9 MR. WEISFELNER: Here's the issue.

10 THE COURT: Okay.

11 MR. WEISFELNER: We'd be prepared to file a motion
12 for authority to file a late proof of claim virtually whenever
13 Your Honor directed us. Here are the open issues. On whose
14 behalf should the motion be filed? And we've got a choice of
15 three potential groups, first wave, second wave, non-ISDs.

16 Second issue is class issues. You heard Mr.
17 Steinberg tell you that certification in the MDL is a '20, '17,
18 '18, or '19 issue. If the parties would concede that for
19 purposes of determining whether or not we're entitled to file a
20 late proof of claim, we'd be permitted to pursue them as class
21 claims consistent with the positions we've taken before Judge
22 Furman in the MDL, then that issue is gone. We'll file our
23 motion, and people can have at it. But it was not to get
24 caught up in our own collective underwear by filing a motion
25 and then arguing over who it is that we purport to represent

1 for purposes of that motion when class certification hasn't
2 happened yet.

3 THE COURT: Right. And that's not likely to happen
4 until when?

5 MR. WEISFELNER: 2018 is our collective best guess.

6 THE COURT: I don't want to wait that long.

7 MR. WEISFELNER: Neither do we. Here's my
8 suggestion.

9 THE COURT: Let me just -- so I think I've only had
10 one case where -- with the class proof of claim issue. It was
11 a WARN Act claim -- or actually, it was the medical because
12 WARN Act is equitable. Okay. And there was going to be --
13 there was, you know, there was -- a claim had been filed, and
14 it was filed on behalf of named individuals and as
15 representatives of whoever. The issue of certifying a class
16 was a different issue, and they ultimately stipulated to it,
17 and fortunately it all got settled, but maybe I don't -- and
18 maybe Mr. Steinberg will tell me what the issues are that he's
19 going to raise in opposition to a motion to file --

20 MR. WEISFELNER: I'm not sure our opposition
21 primarily comes from New GM on this score. And what I was
22 going to suggest is our concern really emanates from
23 discussions we've had with counsel to the GUC Trust, Gibson
24 Dunn, and counsel for the GUC unitholders, Ms. Newman's group.
25 I'm happy to work with them to see if we can't stipulate that

1 solely for purposes of getting to the next step, i.e. us filing
2 a motion for authority to file late claims, that without
3 prejudice to their position on class certification now or any
4 time in the future, that issue will not be raised in opposition
5 to the motion, then I think we can and should get on with the
6 late proof of claim issue.

7 THE COURT: Okay. I don't -- I'm not going to wait
8 until 2018, 2017, 2018 to deal with this issue. And the way it
9 was described in the status report seemed -- it's -- you know,
10 Mr. Peller talked about the -- part of the issue on remand.
11 Well, they reversed Judge Gerber on equitable mootness. It's
12 back, and let's get on with it.

13 MR. STEINBERG: Except, Your Honor, I don't think the
14 Second Circuit reversed Judge Gerber on equitable mootness on
15 the merits. It said there was not a case or controversy
16 because they had no motion for the filing of a late-filed
17 claim. So that's why you see in the status report that if a
18 late file motion is filed, that will be the case or controversy
19 which triggers the Judge Gerber ruling on the substance of
20 equitable mootness.

21 THE COURT: Well, look, I mean, I didn't bring out
22 Judge Gerber's ruling, but equitable mootness, he found, hey,
23 this is substantially consummated. There is -- there's nothing
24 else. Well, the Second Circuit said accordion feature.

25 MR. STEINBERG: No.

1 THE COURT: They do talk about it.

2 MR. STEINBERG: They do.

3 THE COURT: Judge Chin talks about the accordion
4 feature.

5 MR. STEINBERG: They do.

6 THE COURT: And that was why my question to Mr.
7 Weisfelner, what's the allowed amounts of claims now? Thirty-
8 five billion triggers the accordion.

9 MR. STEINBERG: Yes and no. Okay.

10 THE COURT: Tell me why not.

11 MR. STEINBERG: Thirty-five billion is correctly the
12 threshold number, but -- and you'll see this is one of the
13 deferred issues. It's --

14 THE COURT: We're not going to defer it.

15 MR. STEINBERG: No, no. I was describing where it is
16 in the status report. I'm about to tell you.

17 THE COURT: I know it is, and that's -- and I'm
18 telling you we're not going to defer it.

19 MR. STEINBERG: No, no. I understand. Okay. So
20 please strike the word "deferred." Let me just explain to you
21 why I equivocated on the 35 billion.

22 Thirty-five billion is GM's position. It's the
23 second phase of the purchase price. It was -- they paid a
24 credit bid, some cash, some stock, and then if the claims pool
25 had exceeded a certain amount, it was additional consideration

1 stocks and --

2 THE COURT: Stocks.

3 MR. STEINBERG: -- wants stocks to be provided. That
4 was conditioned upon New GM, as the purchaser, getting the
5 benefit of the bargain that it contracted for.

6 THE COURT: Well, I understand you've got your
7 arguments about benefit of the bargain. Good luck.

8 MR. STEINBERG: And therefore, there's an issue.
9 Well, I mean, there's an issue as to whether --

10 THE COURT: Okay. We'll deal with that issue.

11 MR. STEINBERG: Right. Okay.

12 THE COURT: But we're going to move on and brief --
13 and it seemed to me that the best way to do that --

14 I think, Mr. Weisfelner, you should try to agree with
15 the GUC Trust because I'm not -- in deciding whether to allow
16 the late claim, I'm not going to decide the class certification
17 issue at this stage. That's going to get deferred, all right.
18 But I think we ought to see whether the late claims can be
19 filed -- will be permitted, and I'll -- that seems to me to be
20 a threshold issue.

21 MR. STEINBERG: I agree. I agree. That's -- it is
22 listed as a threshold issue.

23 THE COURT: Well --

24 MR. WEISFELNER: It's listed, but here's the problem.

25 MR. STEINBERG: Yeah, let me just say that --

1 THE COURT: The procedure you proposed is not
2 acceptable.

3 MR. WEISFELNER: You sort of get there, right? You
4 know, the --

5 THE COURT: I do.

6 MR. WEISFELNER: The proposal was we file our motion
7 for authority to file a late proof of claim. If Your Honor
8 were to rule in our favor, then according to GM and the GUC
9 Trust, the music stops and we certify your decision for appeal
10 to the Second Circuit.

11 THE COURT: Probably not.

12 MR. WEISFELNER: And that's where we sort of --

13 THE COURT: It might go to Judge Furman, who has the
14 class certification, you know, is going to have to deal -- I
15 mean, he -- as I understand it, isn't he getting any appeals
16 from me in Motors Liquidation?

17 MR. WEISFELNER: I think in fairness to their
18 position, their point is that if Your Honor would have
19 determined that we're entitled to file a late proof of claim,
20 it now makes ripe the question of whether or not the relief
21 that we're seeking is equitably moot, whereas the Second
22 Circuit said, interesting issue, but there's no case or
23 controversy --

24 THE COURT: Right.

25 MR. WEISFELNER: -- other than the one you made up on

1 your own.

2 MR. STEINBERG: And, Your Honor, just to answer your
3 question, Judge Furman hears most, but not all, of the appeals
4 from you. And --

5 THE COURT: Yeah, I saw because one just got bounced
6 from Judge McMahon and got reassigned this morning.

7 MR. STEINBERG: I don't know what's the judge --
8 Judge Abrams has one? Did she have one? Judge Abrams has one.

9 THE COURT: Well, no, I think --

10 MR. STEINBERG: She has the Chenault one, I thought.

11 THE COURT: There was an appeal from my decision
12 about the funding of the trust.

13 MR. STEINBERG: Okay. But that's not something I was
14 involved in. I think Judge Abram --

15 THE COURT: No, 2:01:46.

16 MR. STEINBERG: Yeah. I think Abrams has Your
17 Honor's Chenault decision, where you had indicated that it was
18 with connection with tires and whether --

19 THE COURT: Yeah, that one was good.

20 MR. STEINBERG: So he's not getting them all. But
21 Mr. Weisfelner has articulated what I think the Second Circuit
22 had ruled upon, which is that there was no case or controversy
23 so that if Your Honor was to allow a filing of the late-filed
24 claim -- and we would oppose that, but if Your Honor was to
25 allow that, then what? Because if you then allowed the filing

1 of a late-filed claim, are you going to determine the substance
2 of the claim?

3 THE COURT: I don't know.

4 MR. STEINBERG: Because that's what Judge Furman has,
5 and some of the decisions that Judge Furman will be making --

6 THE COURT: He can withdraw the reference on that if
7 he --

8 MR. STEINBERG: That's correct. And some of the
9 issues that Judge Furman will be making on that issue includes
10 whether the brand theory of damages holds. He's already held
11 that it doesn't hold in that context, and if it doesn't hold in
12 this context --

13 THE COURT: Don't get nervous that if I allow the
14 filing of a late claim that I'm going to be the one to decide
15 the amount, you know, which claims are allowed and which not.

16 MR. STEINBERG: Okay.

17 THE COURT: Okay.

18 MR. STEINBERG: But anyway, that's -- so our view was
19 --

20 THE COURT: Because it should be one judge who
21 decides it, not two.

22 MR. STEINBERG: So our view of the threshold issue
23 was that if they wanted to move the late-filed claims issue up
24 to a threshold issue, that would be fine. But it seemed that
25 once they did it, you did have the case or controversy, and

1 then you had to try to figure out what to do next based on the
2 Second Circuit decision.

3 THE COURT: Yes. And we're going to do that. We're
4 going to move that along. Okay.

5 MR. STEINBERG: That's fine. We had identified that
6 as a threshold issue, and we had not said anything more that
7 once Your Honor rules on it, then it should go. We had said
8 certified, but Your Honor's obviously correct. It doesn't have
9 to be certified to the Second Circuit. It can go to Judge
10 Furman, as well, too, or to Judge Furman because he's handling
11 the MDL.

12 THE COURT: Yes.

13 MR. STEINBERG: So I understand that, as well. And
14 --

15 MR. WEISFELNER: Or the third option is Your Honor
16 may decide what to do, short of determining the allowed amount
17 of the claims. To the extent that Your Honor determines that
18 late claims are allowed and the GUC Trust or anybody else wants
19 to reassert equitable mootness, rather than take it up to Judge
20 Furman or the Second Circuit, Your Honor may decide as a
21 preliminary matter, based on what the Second Circuit has said
22 or Your Honor's own view, because in our view, Judge Gerber
23 didn't take into account the accordion feature when determining
24 equitable mootness, that Your Honor may decide you'll take a
25 crack at it yourself.

1 THE COURT: I might.

2 MR. WEISFELNER: You might.

3 THE COURT: I might well do that.

4 MR. WEISFELNER: There's a third option. That's my
5 only point.

6 MR. STEINBERG: The --

7 THE COURT: And if it gets to the point of actually
8 having to decide what the amount, you know, who has an allowed
9 claim and what's the amount, to the extent that in a different
10 context and before Judge Furman, he may be the one most
11 appropriate to decide it.

12 MR. STEINBERG: Right. And Your Honor, the only
13 other thing I'll say is that whatever they file as a claim,
14 inherent in the issue -- we'll brief this -- inherent in the
15 issue of whether they can file a class claim is to whatever
16 extent Rule 23 reply, most of the cases on class claims
17 incorporate Rule 23, which is the issue that Judge Furman will
18 be tackling in the MDL. So I think the purpose of this is to
19 sort of -- not to try to persuade you on anything today, but to
20 identify the issue. I think you've given us some guidance.
21 I'm not sure if there's more guidance you want us to give as to
22 how to handle the issue and the drafting of the OCS, but that's
23 all I think I have to say on it.

24 THE COURT: All right. Juts bear -- hang on just one
25 second.

1 MR. WEINTRAUB: Your Honor --

2 THE COURT: Yeah, just a second, Mr. Weintraub. Go
3 ahead, Mr. Weintraub.

4 MR. WEINTRAUB: Of course, there are two additional
5 wrinkles to the late-filed claim issue. With respect to the
6 pre-closing ignition switch accident plaintiffs, we don't
7 believe that could be a class proof of claim. We --

8 THE COURT: As to the accident plaintiffs, I Would
9 agree it couldn't be a class proof of claim.

10 MR. WEINTRAUB: We've been moving, timing-wise, in
11 lock step with the economic loss people. We have a motion
12 ready to be filed whenever the Court says it should be filed
13 with respect to 200 proofs of claim. The problem is we don't
14 know that that's all of the proofs of claim that might be
15 filed. Through Mr. Hilliard, we have 200 proofs of claim for
16 his clients. We suspect, but we don't know that there are
17 other plaintiffs attorneys with other clients, and one of the
18 challenges is to how to get notice to those potential people
19 that they should be filing a motion now, too.

20 THE COURT: Mr. Weintraub, in an entirely different
21 context, this morning, I reviewed -- reasoned to review a prior
22 decision of mine where I denied leave to file a late claim, and
23 the argument was that they didn't have proper notices of bar
24 date, and I denied their leave to file a late claim because
25 once they had notice that they hadn't been -- you know, once

1 they found out they hadn't been given proper notice of the
2 bankruptcy, there was nothing to keep them from filing a motion
3 for leave to file late claim, and they waited a year and I said
4 no.

5 All right. So, you know, to the extent you're acting
6 on behalf of others or other counsel here are acting on behalf
7 of others, be mindful that as I understand -- I'm not deciding
8 anything, but as I understand it and decided once before, the
9 law on motions to file a late claim, you've got to act with
10 some diligence. So if somebody turns around a year from now
11 and files a motion to file a late claim, good luck.

12 MR. WEINTRAUB: And I agree with that, but my issue
13 is slightly different. I don't know who knows and who doesn't
14 know that they now have the ability to file a late proof of
15 claim.

16 THE COURT: Well --

17 MR. WEINTRAUB: And we only represent the people that
18 we represent, and all I'm raising to the Court is there may be
19 other people out there, and we --

20 THE COURT: I don't control that either. All I'm
21 saying is that the issue of late claims Mr. Weisfelner raises
22 before you may have -- I was waiting to see where the motion
23 was. It didn't come. I see it listed on the issue list. I
24 didn't particularly agree with the procedure that was proposed.
25 We've heard more -- I have a little better understanding of it

1 now in terms of the class issues. The class issues are not
2 going to get decided at this stage. But I can't -- you know,
3 people will do what they're going to do, and if they're
4 sleeping on their rights, they're sleeping on their rights.

5 MR. WEISFELNER: Your Honor, the other thing that I
6 think is important --

7 THE COURT: Let Mr. Weintraub finish. Go ahead.

8 MR. WEINTRAUB: As I said, Your Honor, we're prepared
9 to file our motion as quickly as possible. What -- and now I'm
10 just thinking out loud. There are procedures through the MDL
11 with the state court liaison.

12 THE COURT: Right.

13 MR. WEINTRAUB: And maybe through that state court
14 liaison, some kind of notice could be given to the great
15 unwashed that they have to do something. So really, all I'm
16 asking is that there be built into whatever the next process is
17 some period of time to at least let that notice happen.

18 THE COURT: Okay. Thank you.

19 MR. WEISFELNER: Your Honor, that was the exact --

20 THE COURT: Mr. Weisfelner.

21 MR. WEISFELNER: -- issue I was going to address. It
22 seems to me that if Your Honor were to rule in favor of whoever
23 the moving parties are with regard to the authority to file
24 late claims, we might, at that point, then decide that the
25 general unwashed masses out there need to get some form of

1 notice. I disagree with my brethren that it ought to be the
2 MDL or any part of the MDL. I think the burden ought to fall
3 on either New GM or, quite frankly, the GUC Trust to give
4 appropriate notice because they're the ones with a fiduciary
5 duty to people who filed claims. But put that aside. I think
6 we can work out notice.

7 THE COURT: I would be very happy if I didn't have
8 200 motions to file late claims, you know, next week or two
9 weeks from now, and you know, you want to raise the issue with
10 the GUC Trust, with New GM, and maybe some other constituencies
11 that you should about the notion that the issue of leave to
12 file a late claim will be raised in this -- as a threshold
13 issue through motions for leave to file a late claim as to
14 other potential parties. They'll have, you know -- I don't say
15 a period, a deadline. So they're not gonna going to be bound.

16 I agree, I don't want to -- I don't think there's a
17 need at this point to have a flood of motions, as long as
18 people have some assurance that, okay, if leave is granted,
19 they will --

20 MR. WEISFELNER: And two points --

21 THE COURT: -- have time.

22 MR. WEISFELNER: -- two points in this regard. You
23 never want to use the courtroom as a bargaining leverage, but
24 when we talked to the GUC Trust about class-type issues, to
25 they extent they're going to raise class-type issues in terms

1 of the validity of our motion, one would think that it then
2 puts leverage on this --

3 THE COURT: Don't make any arguments now.

4 MR. WEISFELNER: Okay.

5 THE COURT: We'll hear the arguments when you --

6 MR. WEISFELNER: The only other point I wanted to
7 make because Your Honor referenced it a couple times. We have
8 a stipulation with the parties that, from their perspective,
9 excuses us from filing this motion until resolution of the
10 Second Circuit -- and by the way, GM's announced their
11 intention to seek to reverse and seek certification.

12 THE COURT: Yes, I saw that so far.

13 MR. WEISFELNER: And that'll be part of our briefing
14 discussion, as well, because as you might imagine, those on
15 this side of the table will also be involved in briefing
16 certification. So -- and I'm sure we can work it out.

17 THE COURT: Look, I can tell you right now that my
18 schedule is pretty full over the next few months. Closing
19 argument in your other case, Mr. Weisfelner --

20 MR. WEISFELNER: I've heard that.

21 THE COURT: -- is going to be sometime in January,
22 and -- unrelated to Motors Liquidation, and there is a trial
23 that I scheduled for April 24th in the adversary proceeding of
24 JPMorgan and the others. So my schedule is pretty full. I --
25 you're all going to work out a briefing schedule, proposed

1 briefing schedule, and it's -- I wish I could get to it
2 immediately, but it's not likely to happen.

3 MR. STEINBERG: Your Honor, one comment and one
4 suggestion on the late-filed claim issue. If they're going to
5 move that they satisfied the Pioneer factors, that actually may
6 require discovery as to whether these people, whoever's moving,
7 was aware of the bar date, was aware of the ignition switch
8 recall and slept on their rights. So --

9 THE COURT: Well, when you get the motion, you can
10 decide whether you -- you can raise --

11 MR. STEINBERG: Right.

12 THE COURT: You can ask them whether they'll agree to
13 discovery, and if not, you can arrange a conference call with
14 me and --

15 MR. STEINBERG: What I was going to suggest on the
16 late-filed claim issue is that it may make sense that -- it
17 seems to me that the plaintiffs' side has to be the movant --
18 has the opening motion, opening brief on that.

19 THE COURT: They do.

20 MR. STEINBERG: And it would seem to me that after
21 that pleading is filed, when we actually see what is there and
22 we actually have an opportunity to talk a little, maybe before
23 we do the next stage of trying to respond to it, we have a
24 status conference --

25 THE COURT: That's fine.

1 MR. STEINBERG: -- to Your Honor and identify --

2 THE COURT: I agree. I agree.

3 MR. STEINBERG: -- all those issues because we have a
4 lot else to brief and things are very fluid in this case.

5 THE COURT: I agree.

6 MR. STEINBERG: Okay.

7 THE COURT: Okay. All right. Anything else I need
8 to deal with today?

9 MR. STEINBERG: No. Just -- I think in the status
10 report, Mr. Weisfelner pointed out to me that I was rather
11 ambitious about when we would present a consensual presentation
12 -- consensual order to show cause, and I think I said probably
13 five business days --

14 THE COURT: I think --

15 MR. STEINBERG: -- and I think we probably need a
16 little more time. Thanksgiving is coming up.

17 THE COURT: I know it is.

18 MR. STEINBERG: But I said business days, so --

19 THE COURT: I want it by December 7th.

20 MR. STEINBERG: December 7th is a good day.

21 THE COURT: Okay.

22 MR. STEINBERG: Thank you.

23 MR. WEISFELNER: That's fine. Thank you, Judge.

24 THE COURT: All right. Thank you.

25 MR. STEINBERG: Is there anything else, Your Honor,

1 for the status conference?

2 THE COURT: Let me -- just let me quickly -- I have a
3 lot of notes in here, but I think I addressed my issues. Yeah.

4 We're adjourned. We're in recess.

5 MR. STEINBERG: Your Honor, may I just say one --
6 just one thing. Just so it's clear what we're going to be
7 doing, we're going to be trying to identify, through the order
8 to show cause process, the threshold issues that we've
9 identified plus the two issues that Mr. Weintraub has
10 identified.

11 THE COURT: Those are threshold issues.

12 MR. STEINBERG: Those are the threshold issues, and
13 that's what you're going to be getting as the order to show
14 cause.

15 THE COURT: That's what I was expecting you to --

16 MR. STEINBERG: What's in the deferred section, we're
17 not going to be addressing.

18 THE COURT: We're not going to deal with now, and the
19 language that you proposed about people being bound, yes, I do
20 want that in there.

21 MR. STEINBERG: Thank you.

22 THE COURT: Thank you. All right. We're adjourned.

23 THE CLERK: All rise.

24 (Proceedings concluded at 1:21 p.m.)

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1 **C E R T I F I C A T I O N**

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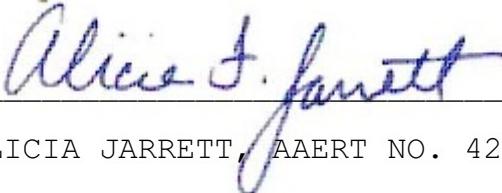
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